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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 697

BENNIE C. CALDWELL, *Petitioner*,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No.

BENNIE C. CALDWELL, *Petitioner*,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Bennie C. Caldwell, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on December 23, 1954 (Pet. App. 12).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit in a two to one opinion, with Judge Washington dissenting, found at Petitioner's Appendix pages 1-7. (218 F. 2d 370)

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on December 23, 1954 (Petitioner's Appendix 12). Petition for rehearing was denied on February 3, 1955 with Circuit Judge Washington dissenting. Petition for rehearing and reargument before the full court was denied on February 3, 1955 with Chief Judge Stephens dissenting, stating that the cause should be reargued before the full bench (Petitioner's Appendix 15). Chief Justice Warren entered an order extending the time within which to file petition for writ of certiorari to April 4, 1955 (Petitioner's Appendix 15).

QUESTION PRESENTED

1. Does not the dissenting opinion of Circuit Judge Washington correctly state that petitioner was denied due process of law by the erroneous and highly prejudicial instructions of the trial judge who instructed the jury under a Title 18, Section 1503 prosecution that an approach to a member of a jury panel then sitting in a criminal cause with a request to obtain the feelings and opinions of the petit jury constituted a *per se* violation of Title 18, Section 1503 of the U. S. Code, requiring a guilty verdict even in the absence of criminal intent.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

1. Constitution of the United States.

2. Fifth Amendment.

3. No person shall be * * * deprived of life, liberty or property, without due process of law * * *.

4. Title 18, Section 1503 of the U. S. Code Annotated:

"*Influencing or injuring officer, juror or witness generally.* Whoever corruptly, or by threats or force, or by any threat-

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ening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769."

STATEMENT OF THE CASE

Petitioner and one Daniel Gary were indicted under a multiple count indictment charging violations of Title 18, and Section 1503 and Title 22, Section 701 of the D. C. Code, Title 18, Section 371. Due to the death of the co-defendant all counts but two and four were dismissed, and petitioner went to trial on two counts, one for violating Title 18, Section 1503 and one Title 22, Section 701, D. C. Code (Pet. App. 11). Petitioner was acquitted of the violation of the local D. C. Statute and the only question involved here is the conviction under the Federal Statute, Title 18, Section 1503 Annotated. The count involved in this petition charged petitioner with approaching one Fraction who was a member of the general panel then doing jury service in the United States District Court for the District of Columbia, and offering $1,000 if he would obtain the feelings and opinions of the petit jury

then sitting in the case of *U. S.* v. *Lewis, Bellici and Acalotti*, Cr. No. 476-49 (Petitioner's Appendix 12-13). As set forth in the count of the indictment, a petit jury in the District was then trying the case of *United States* v. *Lewis, Bellici and Acalotti*, Criminal No. 476-49 (Petitioner's Appendix 1-7). Fraction was not a member of the petit jury but a member of the jury panel. The petitioner denied ever approaching Fraction and his defense was alibi. The trial judge instructed the jury that the essential elements to support a conviction under Title 18, Section 1503 of the Code were as follows:

"(1) That there was a trial going on in the United States District Court for the District of Columbia, namely, Criminal No. 476-49, United States v. Lewis, Bellici and Acalotti;

(2) That prior to the verdict the defendant Caldwell, in the District of Columbia, offered Robert C. Fraction money; and

(3) That said money was offered by Caldwell for the purpose of having Fraction find out the feelings or opinions of the jurors sitting in said case.

If you find beyond a reasonable doubt that the defendant offered Robert C. Fraction a sum of money for the purpose of obtaining information as to the feelings and opinions of the jurors sitting in the Lewis case, prior to the verdict, then you are instructed, as a matter of law, that such act was a corrupt endeavor to influence, obstruct, or impede the due administration of justice in this court, and that is all that the Government must prove in order to establish the defendant's guilt under Count I."

(See petitioner's Appendix, opinion of Circuit Court)

The petitioner's counsel objected to the instruction stating that it did not convey to the jury that there had to be a criminal intent on behalf of the petitioner (Petitioner's Appendix 13). The majority of the court, speaking through Judge Edgerton, in affirming the judgment, recognized that the instruction was not "strictly accurate". Cir-

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cuit Court Judge Washington, in a dissenting opinion, stated the instructions of the trial judge withdrew the issue of criminal intent from the jury and deprived petitioner due process of law. Petitioner was sentenced to serve a term of imprisonment of twenty months to five years and a $500 fine.

REASONS FOR GRANTING THE WRIT

The instructions of the Trial Judge in this case on what constituted the essential elements of the offense to support a conviction under Title 18, Section 1503 of the U. S. Code Annotated constituted, as the dissenting opinion stated, was a direct departure from this court's ruling in *Morrissette* v. *United States*, 342 U.S. 246, and is in direct conflict with the ruling of the Fourth Circuit Court of Appeals in *Martin* v. *United States*, 166 F. 2d 76.

ARGUMENT

The importance of the question involved here can be casually discerned by an inspection of the dissenting opinion of Circuit Judge Washington (Petitioner's Appendix 5-7) and by the fact that a motion for rehearing and reargument before the full bench was denied with Chief Judge Stephens dissenting, he being of the view that the cause should be argued before the full court of the Circuit Court of Appeals (Petitioner's Appendix 15). A study of the legislative history of Title 18, Section 1503 and its interpretation by this court illustrates that it was designed to prohibit all corrupt endeavors to obstruct the administration of justice. In this case, the trial judge instructed the jury, as a matter of law, that an approach to a member of a jury panel, and the offering of a sum of money for the purpose to obtain the feelings and opinions of the jury constituted a *per se violation which, as a matter of law, which would justify a verdict of guilty* (Petitioner's Appendix 13). This was incorrect. Before the jury had retired and pursuant to Rule 30 of the Rules of Federal Criminal Pro-

cedure, the following objections to the trial judge's instructions were made:

> "Mr. Ahern: Your Honor, for the record I want to object to Your Honor's instructing the jury as to what constitutes an offense under the first count. I think Your Honor stated in substance that if they find that Caldwell attempted to ascertain the feelings or opinion that would constitute a violation of the statute. We object to that, Your Honor, and say that the jury should have been instructed that they must go beyond that, and that they must find that there was an actual intent to effect it, in the discharge of their duties."

This court, in *Morrissette* v. *United States* stated:

> "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury."

Even the majority opinion recognized the inaccuracy of the instructions but ruled the correctness, incorrectness or omission of instructions on the necessity of criminal intent was harmless error since the defense was not one of justification, but of alibi (Petitioner's Appendix 4). However, this court in the Morrissette case affirmed the language of Judge Andrews in *People* v. *Flack*, 125 N.Y. 324, as follows:

> "However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intent, the question of intent can never be ruled as a question of law, but must always be submitted to the jury."

The recognition of error in the instructions by the majoirty of the court below and the dissenting judge brings forth this court's admonition in *Bollenbach* v. *U. S.*, 326 U. S. 607:

> "A conviction ought not to rest on an equivocal direction to a jury on a basic issue. And a *charge* deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal."

As pointed out in the dissenting opinion, the instructions complained of here were so prejudicial that were there no

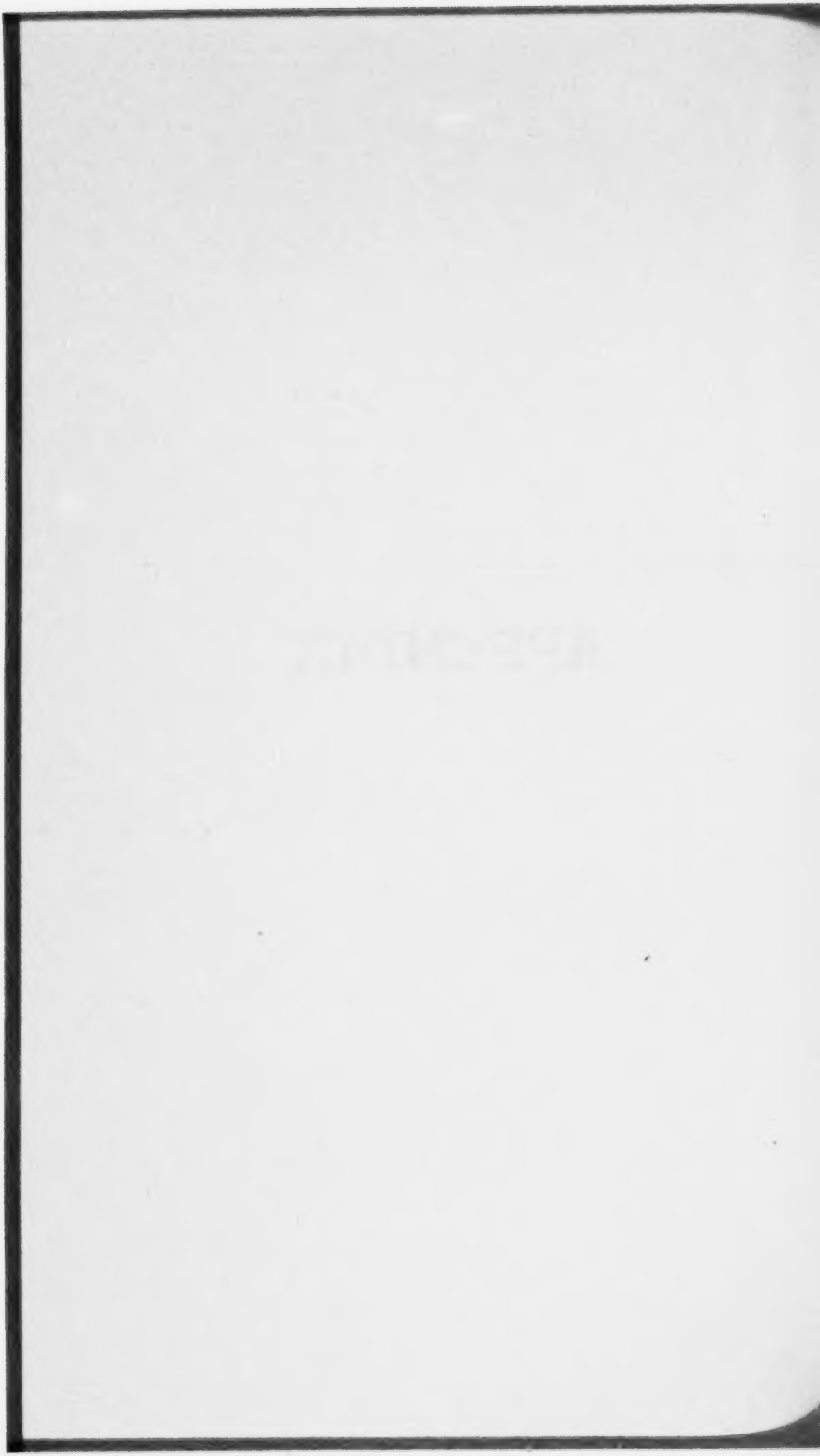
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objection this court should apply the doctrine in *Screws* v. *United States*, 325 U.S. 91, and hold petitioner's substantial rights were prejudiced. As the dissenting opinion points out this opinion is also in conflict with the ruling of the Fourth Circuit in *Martin* v. *United States*, 166 F. 2d 76, construed Title 18, Section 1503 as having within it the concept of improper motive and this had to be established before guilt would attach. See *Berkovitz* v. *U. S.* (8 Cir.), 213 F. 2d 468. Here, because the defense was alibi, the majority opinion seeks to sustain a criminal conviction where the issue of criminal intent was withdrawn from the jury. To apply such a doctrine would allow a rape conviction to stand where the defense was alibi and the judge failed to instruct on the issue of consent. The instructions were highly prejudicial and denied petitioner due process of law. Here all judges in Court of Appeals recognized the erroneous instructions of the trial judge that an approach to Fraction constituted an offense as a matter of law. In conformity with this court's supervisory powers over the administration of criminal law in the Federal courts and this court's pronouncement outlined in *Morrissette* v. *United States*, *supra*, it becomes the duty of this court to grant the petition for writ of certiorari and reverse and remand the judgment of the United States Court of Appeals for the District of Columbia Circuit.

CONCLUSION

In this case the petitioner's conviction rests upon erroneous instructions of the trial judge who ruled that an approach to a member of the jury panel with a request to obtain the feelings and opinions of the jury constituted an offense under Title 18, Section 1503 U.S.C.A. *as a matter of law*. This removed the issue of criminal intent from the jury's province and deprived petitioner of due process of law.

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National Press Building,
Attorney for Petitioner.



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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12096

BENNIE C. CALDWELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided December 23, 1954

Mr. Albert J. Ahern, Jr., with whom *Mr. James J. Laughlin* was on the brief, for appellant.

Mr. Lewis A. Carroll, Assistant United States Attorney, with whom *Messrs. Leo A. Rover*, United States Attorney, and *Arthur J. McLaughlin* and *Samuel J. L'Hommedieu, Jr.*, Assistant United States Attorneys, were on the brief, for appellee.

Before EDGERTON, WASHINGTON, and DANAHER, Circuit Judges.

EDGERTON, *Circuit Judge:* Caldwell appeals from a conviction[1] under Count I of an indictment. This count charges that he "offered a sum of money to Robert C. Fraction, endeavoring to influence the said Fraction to obtain information from the petit jurors theretofore im-

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[1] We reversed a former conviction. *Caldwell* v. *United States*, 92 U.S. App. D.C. 355, 205 F. 2d 879.

paneled in the United States District Court for the District of Columbia in the case of United States v. Lewis, Bellici and Acalotti (Criminal Case No. 476-49), as to the feelings and opinions of the said jurors concerning the said trial before the return of the verdict; by reason whereof, on or about January 19, 1950, within the District of Columbia, the said Bennie C. Caldwell did corruptly endeavor to influence, obstruct and impede the due administration of justice in the said United States District Court for the District of Columbia in violation of 18 U.S.C. 1503 (1948)."

18 U.S.C. § 1503 provides that whoever "corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Fraction testified that Caldwell offered him $1,000 to "get among the jurors and keep him posted. . . . He wanted me to talk with the jurors, feel them out and see how they felt towards the particular case." There was no testimony as to the motive behind Caldwell's attempt to influence Fraction to get this information. There was no testimony that Fraction accepted any money or approached any juror. Caldwell testified that he never made any offer to Fraction.

The court charged the jury "as a matter of law, that if any person endeavors to ascertain the feelings or opinions of jurors while they are sitting in a case and prior to their verdict, that is a corrupt endeavor to obstruct or impede the due administration of justice.

"Under the facts in this case, in order for you to find the defendant Caldwell guilty under Count I, the Government must prove beyond a reasonable doubt each and all of the following elements:

"(1) That there was a trial going on in the United States District Court for the District of Columbia,

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namely, Criminal No. 476-49, United States v. Lewis, Bellici and Acalotti;

"(2) That prior to the verdict the defendant Caldwell, in the District of Columbia, offered Robert C. Fraction money; and

"(3) That said money was offered by Caldwell for the purpose of having Fraction find out the feelings or opinions of the jurors sitting in said case.

". . . If you find beyond a reasonable doubt that the defendant offered Robert C. Fraction a sum of money for the purpose of obtaining information as to the feelings and opinions of the jurors sitting in the Lewis case, prior to the verdict, then you are instructed, as a matter of law, that such act was a corrupt endeavor to influence, obstruct, or impede the due administration of justice in this court, and that is all that the Government must prove in order to establish the defendant's guilt under Count I."

The Supreme Court has said: "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. . . . The integrity of jury proceedings must not be jeopardized by unauthorized invasions." *Remmer* v. *United States*, 347 U.S. 227, 229. That unauthorized invasions "obstruct, or impede, the due administration of justice" is as plain as that they are prejudicial. Even "shadowing" jurors, without their knowledge, obstructs justice. *Sinclair* v. *United States*, 279 U.S. 749. Since unauthorized invasions of the integrity of jury proceedings are evil, they are "corrupt". *Cf. Bosselman* v. *United States*, 2 Cir., 239 Fed. 82, 86; *United States* v. *Polakoff*, 2 Cir., 121 F. 2d 333, 335.

The construction of the statute is a question of law for the court. The only questions of fact in the case are

the questions the judge submitted to the jury. The only intent involved in the crime is the intent to do the forbidden act. The defendant "must have had knowledge of the facts, though not necessarily the law, that made" his act criminal. *Morrissette* v. *United States*, 342 U.S. 246, 271.

No doubt one part of the judge's charge to the jury was too broad to be strictly accurate. Attempts by some persons in some circumstances to ascertain the feelings or opinions of jurors in a pending case might not be corrupt endeavors to obstruct or impede justice. If, for example, a bailiff made the attempt, believing he was carrying out an order of the trial judge, he might not be guilty. But such possibilities have nothing to do with this case. Caldwell's defense was an alibi. There was no evidence of any circumstances, and no contention that there was any circumstance, that might create a justification, privilege, or excuse for his attempt to ascertain the feelings or opinions of the jurors in the Lewis case. It follows that if, in not informing the jury that there might be such circumstances in some cases, the court can be said to have erred, the error did not affect substantial rights. It was completely harmless. To reverse this conviction would be like reversing an ordinary homicide conviction because the court did not explain to the jury that the homicide would have been justified if the accused had been a public officer duly executing a valid death sentence. Rule 52(a) of the FEDERAL RULES OF CRIMINAL PROCEDURE provides that "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The Supreme Court has said "If, when all is said and done, the conviction is sure that the error did not influence the jury . . . the verdict and the judgment should stand . . ." *Kotteakos* v. *United States*, 328 U.S. 750, 764.

There is one more reason for affirmance. Rule 30 of the FEDERAL RULES OF CRIMINAL PROCEDURE provides among other things that "No party may assign as error

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any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Appellant's counsel did not state to the trial judge the respect in which the charge was inaccurate. Counsel said: "I think Your Honor stated in substance that if they find that Caldwell attempted to ascertain the feelings or opinion that would constitute a violation of the statute. We object to that, Your Honor, and say that the jury should have been instructed that they must go beyond that, and that they must find that there was an actual intent to effect it, in the discharge of their duties." This was incorrect. *Cf. Sinclair* v. *United States, supra.*

Affirmed.

WASHINGTON, *Circuit Judge,* dissenting: Tampering with a jury is an abhorrent crime, poisonous to our system of justice. The evidence against Caldwell was ample. But I am forced to the conclusion that the erroneous instructions given to the jury were highly prejudicial to the accused and deprived him of due process of law. He must, in my view, be granted a new trial. Such a trial would—regrettably—be his third, since the first trial had to be set aside because of the tactics of the prosecution. *Caldwell* v. *United States,* 92 U.S.App.D.C. 355, 205 F.2d 879 (1953). But the standards of justice cannot be relaxed in such a situation: the fact that an accused has undergone more than one trial does not dilute his right to just and lawful treatment. See *Leyra* v. *Denno,* 347 U.S. 556 (1954).

The statute here is aimed at any person who "corruptly" endeavors to influence a juror. 18 U.S.C. § 1503 (1951). The word "corruptly," the Fourth Circuit has said, "means for an improper motive." *Martin* v. *United States,* 166 F.2d 76, 79 (1948). The instructions to the jury trying Caldwell told them that "as a matter of law"

anyone who seeks to ascertain the feelings or opinions of jurors while they are sitting in a case and prior to a verdict is engaged in "a corrupt endeavor to obstruct or impede the due administration of justice." This took from the jury a crucial issue — that of criminal intent. Corrupt motive is one of the essential elements of the crime defined in the statute: the issue whether the accused had that motive is one for the Government to prove beyond a reasonable doubt, and for the jury to determine on that proof. *Martin* v. *United States, supra.* The Supreme Court has only recently warned us that the judge cannot usurp this function of the jury: he cannot "presume" criminal intent from the defendant's actions. *Morrisette* v. *United States,* 342 U.S. 246, 274 (1952). To allow him to do so would be to "strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries." *Id.* at 263.[1]

True, Caldwell's counsel did not make precisely this argument to the trial court. But he objected to the charge as given, because it told the jury that "if they find that Caldwell attempted to ascertain the feelings or opinion [of the Lewis jury] that would constitute a violation of the statute." His point was well taken. And even assuming that we are to treat the case as if no objection were raised, we must still grant a new trial. In *Screws* v. *United States,* 325 U.S. 91 (1945), where the question of criminal intent was submitted to the jury without proper instructions, and no objection was raised, the court reversed the conviction, saying: ". . . where

[1] As has been noted, the crime at hand is one for which the requirement of criminal intent is well established. The reasoning of Morissette is thus directly applicable to it. It is further to be noted that the crime of influencing a juror is part of the ancient common-law crimes of embracery and of obstructing justice. 18 AM. JUR. 616; 39 AM. JUR. 501-2. It was embodied in the statutory law of the United States by Act of March 2, 1831, "An Act declaratory of the law concerning contempts of court." (4 STAT. 487, 488)

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the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial." *Id.* at 107. I think we must make a like holding here.

Filed Feb. 11, 1954

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 970-50

UNITED STATES OF AMERICA

vs.

BENNIE C. CALDWELL

Judgment and Commitment

On this 11th day of February 1954 came the attorney for the Government and defendant appeared in person and by counsel, James J. Laughlin and Albert Ahern, Esquire.

It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of

Violation of Section 1503, Title 18 U. S. Code as charged in count one.

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

twenty (20) months to five (5) years and to pay a fine of $500.00

BURNITA SHELTON MATTHEWS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Jan. Term, 1950

Criminal No. 970-50

UNITED STATES OF AMERICA

vs.

BENNIE C. CALDWELL, DANIEL M. GARY

Indictment

COUNT ONE:

On April 8, 1949, an indictment (No. 476-49) was filed in this Court against William Lewis, Attilio Acalotti and Frank Billici, charging them with operating a numbers lottery in the District of Columbia in violation of 22 D. C. Code 1501. On January 9, 1950, a petit jury was impaneled and the trial of that case commenced in Criminal Court Number One of this Court, which trial concluded on January 26, 1950, by the return by the jury of a verdict of guilty as to each defendant therein.

That Bennie C. Caldwell and Daniel M. Gary, hereby indicted, throughout the period from about April 8, 1949, to about January 26, 1950, conspired with each other, and with other persons to the grand jury unknown, to commit an offense against the United States, that is, a violation of 22 D. C. 701. The object and purpose of the conspiracy was to promise, offer and give money and other things of value to petit jurors sitting in the aforementioned trial, with intent to influence the decision, action and verdict of said jurors.

OVERT ACTS:

To effect the object of the conspiracy described in the preceding paragraphs, the defendants did the following overt acts, among others:

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1. On or about January 19, 1950, defendant Caldwell went to 2705 Stanton Road, S. E., within the District of Columbia, and there had a conversation with Robert C. Fraction, who was then a member of the panel of petit jurors in Criminal Court Number One.

2. On or about January 23, 1950, the defendant Gary went to 49-47th Street, S.E., within the District of Columbia, and there had a conversation with Luraner D. Ivey, who was then a member of the petit jury trying the aforementioned case.

3. On or about January 23, 1950, the defendant Caldwell went to 1329 Montello Ave. N.E., within the District of Columbia, and there had a conversation with George T. Walker, who was then the husband of Sallie J. Walker who was then a member of the petit jury trying the aforementioned case.

COUNT TWO:

On or about January 19, 1950, within the District of Columbia, Bennie C. Caldwell offered a sum of money to Robert C. Fraction, endeavoring to influence the said Fraction to obtain information from the petit jurors theretofore impaneled in the United States District Court for the District of Columbia in the case of *United States* v. *Lewis, Billici and Acalotti* (Criminal Case No. 476-49), as to the feelings and opinions of the said jurors concerning the said trial before the return of the verdict; by reason whereof, on or about January 19, 1950, within the District of Columbia, the said Bennie C. Caldwell did corruptly endeavor to influence, obstruct and impede the due administration of justice in the said United States District Court for the District of Columbia, in violation of 18 U.S.C. 1503 (1948).

COUNT THREE:

On or about January 23, 1950, within the District of Columbia, Daniel M. Gary promised and offered a sum of

money to Luraner D. Ivey, who then was, and was then and there known to the said Gary to be, a petit juror in the trial, in the United States District Court for the District of Columbia, of the case of *United States* v. *Lewis, Billici and Acalotti* (Criminal Case No. 476-49), with intent to influence the decision, action and verdict of the said Luraner D. Ivey in the said trial, in violation of 22 D. C. 701.

COUNT FOUR:

On or about January 23, 1950, within the District of Columbia, Bennie C. Caldwell caused a sum of money to be promised and offered to Sallie Walker, who then was, and was then and there known to the said Caldwell to be, a petit juror in the trial, in the United States District Court for the District of Columbia, of the case of *United States* v. *Lewis, Billici and Acalotti* (Criminal Case No. 476-49), with intent to influence the decision, action and verdict of said Sallie Walker in the said trial, in violation of 22 D. C. 701.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 970-50

UNITED STATES OF AMERICA, *Plaintiff*

vs.

BENNIE C. CALDWELL, *Defendant*

COUNT TWO:

On or about January 19, 1950, within the District of Columbia, Bennie C. Caldwell offered a sum of money to Robert C. Fraction, endeavoring to influence the said Fraction to obtain information from the petit jurors there-

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tofore impaneled in the United States District Court for the District of Columbia in the case of *United States* v. *Lewis, Billici and Acalotti* (Criminal Case No. 476-49), as to the feelings and opinions of the said jurors concerning the said trial before the return of the verdict; by reason whereof, on or about January 19, 1950, within the District of Columbia, the said Bennie C. Caldwell did corruptly endeavor to influence, obstruct and impede the due administration of justice in the said United States District Court for the District of Columbia, in violation of 18 U.S.C. 1503 (1948).

COUNT FOUR:

On or about January 23, 1950, within the District of Columbia, Bennie C. Caldwell caused a sum of money to be promised and offered to Sallie Walker, who then was, and was then and there known to the said Caldwell to be, a petit juror in the trial, in the United States District Court for the District of Columbia, of the case of *United States* v. *Lewis, Billeci and Acalotti* (Criminal Case No. 476-49), with intent to influence the decision, action and verdict of said Sallie Walker in the said trial, in violation of 22 D.C. 701.

Filed Dec. 23, 1954

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

October Term, 1954.

No. 12,096

BENNIE C. CALDWELL, *Appellant*

vs.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court
for the District of Columbia.

Before: EDGERTON, WASHINGTON, and DANAHER,
Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ..... ordered and adjudged by this Court that the judgment ..... of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: December 23, 1954.

PER CIRCUIT JUDGE EDGERTON.

Separate dissenting opinion by CIRCUIT JUDGE WASHINGTON.

Record 555

Under the facts in this case, in order for you to find the defendant Caldwell guilty under Count I, the Government must prove beyond a reasonable doubt each and all of the following elements:

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(1) That there was a trial going on in the United States District Court for the District of Columbia, namely, Criminal No. 476-49, United States v. Lewis, Bellici and Acalotti;

(2) That prior to the verdict the defendant Caldwell, in the District of Columbia, offered Robert C. Fraction money; and

(3) That said money was offered by Caldwell for the purpose of having Fraction find out the feelings or opinions of the jurors sitting in said case.

It is not necessary that you find that Caldwell actually tendered the money, or that Fraction accepted the money, or that he agreed to accept it or to do anything or that he actually did anything, pursuant to the alleged offer by the defendant Caldwell. If you find beyond a reasonable doubt that the defendant offered Robert C. Fraction a sum of money for the purpose of obtaining information as to the feelings and opinions of the jurors sitting in the Lewis case, prior to the verdict, then you are instructed, as a matter of law, that such act was a corrupt endeavor to influence, obstruct, or impede the due administration of justice in this court, and that is all that the Government must prove in order to establish the defendant's guilt under Count I.

Record 566

MR. AHERN: Your Honor, for the record I want to object to Your Honor's instructing the jury as to what constitutes an offense under the first count. I think Your Honor stated in substance that if they find that Caldwell attempted to ascertain the feelings or opinion that would constitute a violation of the statute. We object to that, Your Honor, and say that the jury should have been instructed that they must go beyond that, and that they must find that there was an actual intent to effect it, in the discharge of their duties.

Filed Feb. 3, 1955

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1955

No. 12,096

BENNIE C. CALDWELL, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee*

Before: EDGERTON, WASHINGTON and DANAHER, *Circuit Judges,* in Chambers.

Order

Upon consideration of appellant's motion for leave to file a typewritten petition for rehearing and of the supplement to said motion, and it appearing that appellant's typewritten petition for rehearing has been lodged with the Court, it is

ORDERED by the Court that the motion for leave to file a typewritten petition for rehearing be granted and that the Clerk be, and he is hereby, directed to file forthwith appellant's typewritten petition for rehearing.

It is FURTHER ORDERED by the Court that appellant's petition for rehearing be, and it is hereby, denied.

Per Curiam.

Dated: February 3, 1955

Circuit Judge Washington is of the opinion the petition for rehearing should be granted.

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Filed Feb. 3, 1955

Before: STEPHENS, Chief Judge, and EDGERTON, WILBUR K. MILLER, PRETTYMAN, BAZELON, FAHY, WASHINGTON, DANAHER and BASTIAN, *Circuit Judges* in Chambers.

Order

Upon consideration of appellant's motion for leave to file a petition for rehearing in banc in typewritten form, and of the supplement to said motion, and it appearing that appellant's typewritten petition for rehearing in banc has been lodged with the Court, it is

ORDERED by the Court that the motion for leave to file a typewritten petition for rehearing in banc be granted and that the Clerk be, and he is hereby directed to file forthwith appellant's typewritten petition for a rehearing in banc.

It is FURTHER ORDERED by the Court that appellant's petition for a rehearing in banc be, and it is hereby, denied.

Per Curiam.

Dated: February 3, 1955

Chief Judge Stephens is of the view the petition for rehearing in banc should be granted.

SUPREME COURT OF THE UNITED STATES

No. , October Term, 1954.

BENNIE C. CALDWELL, *Petitioner,*

vs.

UNITED STATES OF AMERICA

Order Extending Time to File Petition for Writ of Certiorari

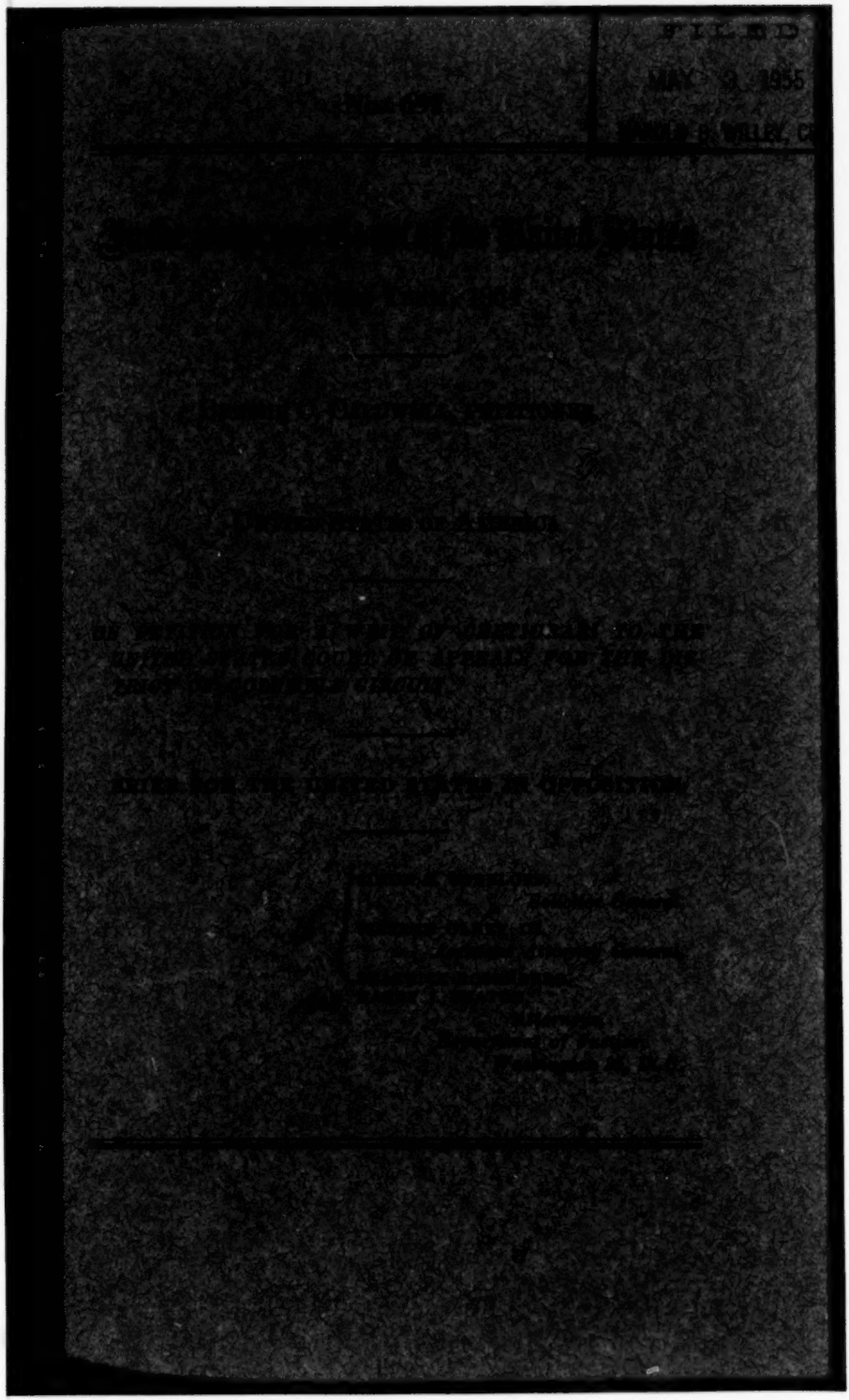
UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 4th, 1955.

/s/ EARL WARREN
Chief Justice of the United States.

Dated this 4th day of March, 1955.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 697

BENNIE C. CALDWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1-7, R. 869-875) are reported at 218 F. 2d 370.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1954 (Pet. App. 12; R. 876). Petitions for rehearing were denied on February 3, 1955 (Pet. App. 14, 15; R. 880, 881). On March 4, 1955, the Chief Justice extended the time for

filing a petition for a writ of certiorari to April 4, 1955. The petition for a writ of certiorari was filed on April 4, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether, on a charge of endeavoring to impede the administration of justice by trying to ascertain the sentiments of jurors before verdict, the court should have instructed the jury that in order to convict it must find that the defendant had a specific corrupt motive.

STATUTE INVOLVED

18 U. S. C. 1503 provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such

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grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was convicted in the District Court for the District of Columbia on one count of an indictment charging obstruction of justice in violation of 18 U. S. C. 1503. He was sentenced to a term of imprisonment of from 20 months to five years and was fined $500 (R. 848, 849).[1]

The pertinent count of the indictment charged in

[1] Petitioner was acquitted of a violation of Title 22, Section 701 of the D. C. Code, charged in the second count of the indictment. The indictment upon which petitioner was tried was a four-count indictment returned on June 6, 1950 naming one Daniel M. Gary in a conspiracy count with petitioner and in another count alone. (R. 834-836.) On May 7, 1951, a severance was ordered as to Gary for reasons of health (R. 437). Petitioner went to trial on the two counts naming him alone and was convicted. On appeal the conviction was reversed and the case remanded for a new trial. *Caldwell* v. *United States*, 205 F. 2d 879 (C.A. D.C.). The new trial resulted in the conviction which is before this Court.

substance that petitioner on or about January 19, 1950, had offered a sum of money to one Robert C. Fraction in an endeavor to influence him to sound out the feelings and opinions of the jurors impaneled in the case of *United States* v. *Lewis, Bellici and Acalotti* prior to return of the verdict, and that petitioner thereby corruptly endeavored to influence, obstruct and impede the due administration of justice in the United States District Court for the District of Columbia where the *Lewis* case was being tried. (Pet. App. 10-11; R. 835.)

The evidence in support of this charge may be summarized as follows:

It was stipulated that the case of *United States* v. *Lewis, et al.* (Criminal Case No. 476-49) went to trial before Judge Holtzoff in the United States District Court for the District of Columbia on January 11, 1950, and lasted until January 25, 1950, the verdict being brought in on January 26, 1950 (R. 6, 7, 25). The panel was selected on January 3, 1950 (R. 15). Robert Fraction testified that he was a member of the panel but did not serve as a juror in the *Lewis* case (R. 27-28). About a week after the beginning of the trial, petitioner, whom Fraction did not know, came to Fraction's house about 11:30 p. m. (R. 31-32). Petitioner introduced himself as Lance and claimed to be acquainted in the neighborhood (R. 32).

Petitioner told Fraction that he knew that Fraction was on the *Lewis* case jury, that there was plenty of money in the case, that the lawyers were getting $10,000 each "and we might as well get

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some of it" (R. 32-33). Petitioner offered Fraction $1,000 "To get among the jurors, and keep him posted" (R. 33). He wanted him to "talk with the jurors, feel them out and see how they felt towards the particular case." (R. 34.) Fraction refused the money (R. 33-34). Subsequently Fraction identified petitioner in an FBI line-up (R. 37-38). There was considerable testimony, including petitioner's own, that he attended the Lewis trial on numerous occasions (R. 82, 99-100, 502) but no testimony as to the motive behind petitioner's attempt to influence Fraction to obtain the views of the jurors. Petitioner testified in his own behalf (R. 444-450). His defense was an alibi (R. 445).

At the conclusion of the case the court charged the jury [2] as follows with respect to the term "corruptly" as used in 18 U. S. C. 1503:

> The word "corruptly", is capable of different meanings in different connections. As used in this statute, "corruptly" means simply for an improper motive. Such motive may be the hope of pecuniary reward or benefit, or it may be the desire to aid someone else; but under this particular statute, any endeavor to impede or obstruct the due administration of justice is corrupt.

It defined the terms "obstruct", "impede" and "endeavor". Then, after explaining the great importance of the integrity and sacredness of the

[2] The complete charge of the trial judge relating to the obstruction of justice count is set out in the Appendix, *infra*, p. 12.

jury, it charged as "a matter of law" that "if any person endeavors to ascertain the feelings or opinions of jurors while they are sitting in a case and prior to their verdict, that is a corrupt endeavor to obstruct or impede the due administration of justice."

The court set out as the elements which the government had to prove beyond a reasonable doubt to support a verdict of guilty the following:

> (1) That there was a trial going on in the United States District Court for the District of Columbia, namely, Criminal No. 476-49, United States v. Lewis, Bellici and Acalotti;
>
> (2) That prior to the verdict the defendant Caldwell, in the District of Columbia, offered Robert C. Fraction money; and
>
> (3) That said money was offered by Caldwell for the purpose of having Fraction find out the feelings or opinions of the jurors sitting in said case.

It stated:

> * * * If you find beyond a reasonable doubt that the defendant offered Robert C. Fraction a sum of money for the purpose of obtaining information as to the feelings and opinions of the jurors sitting in the Lewis case, prior to the verdict, then you are instructed, as a matter of law, that such act was a corrupt endeavor to influence, obstruct, or impede the due administration of justice in this court, and that is all that the government must prove in

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> order to establish the defendant's guilt under Count I.

At the conclusion of the instructions counsel for petitioner objected to these charges as follows:

> * * * I think Your Honor stated in substance that if they find that Caldwell attempted to ascertain the feelings or opinion that would constitute a violation of the statute. We object to that, Your Honor, and say that the jury should have been instructed that they must go beyond that, and that they must find that there was an actual intent to effect it, in the discharge of their duties.

Petitioner contested the validity of the instructions on appeal. The court of appeals affirmed, Judge Washington dissenting (Pet. App. 1-7; R. 869-875).

ARGUMENT

The pertinent portion of 18 U. S. C. 1503 provides that "Whoever * * * corruptly * * * endeavors to influence, obstruct, or impede, the due administration of justice, * * *" shall be punished. It is not disputed that this crime requires criminal intent. Cf. *Morissette* v. *United States*, 342 U. S. 246. It is also clear that the trial court did charge on criminal intent, since it required the jury to find that petitioner offered money to Fraction "for the purpose of having Fraction find out the feelings or opinions of the jurors sitting in said case."

The ultimate issue in this case, therefore, is

whether the court, in addition, should have instructed the jury that they had to find that petitioner's attempt to discover the feelings of the jury was accompanied by a specific corrupt motive. Petitioner, relying upon the dissenting opinion below, argues that a corrupt motive is an element of the offense, and that, in charging that the mere endeavor to ascertain the feelings of the jurors established the corrupt endeavor condemned by the statute, the court withdrew from the jury an element of the requisite intent.

It is clear, as the majority below held, that an unauthorized attempt to ascertain the sentiments of jurors sitting on a pending case is a corrupt attempt to obstruct the administration of justice regardless of the specific motive for such act. What is here involved is not a mere communication with jurors, but an attempt to ascertain their probable vote through a paid intermediary. As the district court pointed out in its charge, great precautions are always taken to prevent such knowledge from being disclosed. It is axiomatic that the integrity and sacredness of the jury in a criminal case is of the highest importance and that therefore "The integrity of jury proceedings must not be jeopardized by unauthorized invasions". *Remmer* v. *United States,* 347 U. S. 227, 229. Consequently, any unauthorized endeavor tending to interfere with or affect the jury process necessarily obstructs justice. The courts have long so held. Thus, the mere shadowing of jurors, though unknown to them, has been held to be a con-

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tempt of court because it "tended to obstruct the honest and fair administration of justice". *Sinclair* v. *United States*, 279 U. S. 749, 764.[3] An experimental approach to the corruption of a juror was held to be an "endeavor" within the meaning of a prior and substantially identical obstruction-of-justice statute where the defendant was inquiring of a prospective juror's wife what her husband's feelings about a case were, because the defendants in the case "did not want to pay money to any of the petit jurors sitting at the trial unless they knew such petit jurors would favor their acquittal." *United States* v. *Russell*, 255 U. S. 138, 141.[4]

Although the term "corruptly" is capable of numerous meanings in different contexts, as used to qualify "endeavor" in 18 U. S. C. 1503, it simply means any intentional endeavor to obstruct justice. The intent required is no more than knowledge or notice that justice is being administered coupled with the intention to do the forbidden act. *Pettibone* v. *United States*, 148 U. S. 197, 207; *Broadbent* v. *United States*, 149 F. 2d 580, 581 (C. A. 10). Where knowledge is shown to be present and the intended act does in fact constitute an endeavor to obstruct justice, then an intentional endeavor to obstruct justice is established. It is no defense that

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[3] It may be noted that the contempt statute and 18 U.S.C. 1503 originated as complementary legislation in the Act of March 2, 1831, 4 Stat. 487, 488.

[4] See *Emery* v. *State*, 78 Neb. 547, 111 NW 374, where sounding out a juror to find out how he stood with reference to a case was held to be contemptuous.

the defendant acted for the highest motives; in fact, motive is wholly immaterial. *Kong* v. *United States*, 216 F. 2d 665, 668 (C. A. 9).

Petitioner contends that a construction of the term "corruptly" which would not require a specific improper motive would be in conflict with the ruling of the Fourth Circuit in *Martin* v. *United States*, 166 F. 2d 76. That case, however, does not stand for the proposition that improper motive is a necessary element of the offense. There, the trial court had charged that "corruptly" meant "for an improper motive". The court of appeals held that the elements of corrupt intent and guilty knowledge had been adequately covered by the charge, but since no issue was or could have been raised as to whether the charge on motive was required, the court was not called upon to decide whether such an instruction must be given in every case. In any event, as shown above, the weight of authority is to the contrary.

The majority of the court below, did not, as petitioner contends, recognize that the trial court's instructions were inaccurate with respect to the necessity of criminal intent. It found the charge inaccurate only insofar as it failed to include the possibility of an authorized attempt to contact the jury. It was this error which the court found nonprejudicial under Rule 52(a) of the Federal Rules of Criminal Procedure on the ground that petitioner's defense was an alibi (Pet. App. 4). Manifestly, the possible existence of authorized attempts by court officials to ascertain how a jury stands has no significance with respect to the facts of this case.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and further review is not called for. It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
HARRY J. KEATON,
Attorneys.

MAY, 1955.

APPENDIX

The full charge of the trial judge relating specifically to the obstruction of justice count reads as follows:

As I have told you, Count I charges the defendant, Bennie C. Caldwell, with corruptly endeavoring to influence, obstruct, and impede the due administration of justice in this court, in that on or about January 19, 1950, in the District of Columbia, he offered a sum of money to Robert C. Fraction for the purpose of having Fraction obtain from the jurors impaneled in the case of United States v. Lewis, Bellici, and Acalotti, Criminal Case No. 476-49, which was then on trial in this court and prior to the verdict therein, information as to their feelings and opinions concerning that trial.

The pertinent part of the statute relating to the offense on which Count I is based, reads as follows:

> "Whoever corruptly endeavors to influence, obstruct, or impede the due administration of justice shall be"

punished as prescribed by the statute.

The word "corruptly", is capable of different meanings in different connections. As used in this statute, "corruptly" means simply for an improper motive. Such motive may be the hope of pecuniary reward or benefit, or it may be the desire to aid someone else; but under this particular statute, any endeavor to impede or obstruct the due administration of justice is corrupt.

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The words "obstruct" and "impede" I believe are clear without definition; they mean merely to block, or to hinder, or to retard.

You may wonder just what sort of action constitutes an endeavor. Any effort to accomplish the evil purpose that the statute was enacted to prevent, even if the effort falls short of an actual attempt to influence the jurors, and even if it is anticipatory or preparatory to an affirmative attempt to influence the jurors, or some other attempt to obstruct or impede justice, is an endeavor within the meaning of the statute.

Now, as you have learned in your term of jury service here, jurors, after they are impaneled and while they are hearing the testimony of a trial, must not talk about the case on trial until after they have rendered their verdict in the case and have been discharged; and, particularly, no one should inquire prior to the verdict as to the jurors' feelings or opinions as to the matter on trial. The integrity or sacredness of the jury as to a case on trial must be inviolate, in order that both the defendant and the prosecution may have the benefit of the jurors' own verdict, untouched by any outside influence.

So, you are instructed, as a matter of law, that if any person endeavors to ascertain the feelings or opinions of jurors while they are sitting in a case and prior to their verdict, that is a corrupt endeavor to obstruct or impede the due administration of justice.

Under the facts in this case, in order for you to

find the defendant Caldwell guilty under Count I, the Government must prove beyond a reasonable doubt each and all of the following elements:

(1) That there was a trial going on in the United States District Court for the District of Columbia, namely, Criminal No. 476-49, United States v. Lewis, Bellici and Acalotti;

(2) That prior to the verdict the defendant Caldwell, in the District of Columbia, offered Robert C. Fraction money; and

(3) That said money was offered by Caldwell for the purpose of having Fraction find out the feelings or opinions of the jurors sitting in said case.

It is not necessary that you find that Caldwell actually tendered the money, or that Fraction accepted the money, or that he agreed to accept it or to do anything or that he actually did anything, pursuant to the alleged offer by the defendant Caldwell. If you find beyond a reasonable doubt that the defendant offered Robert C. Fraction a sum of money for the purpose of obtaining information as to the feelings and opinions of the jurors sitting in the Lewis case, prior to the verdict, then you are instructed, as a matter of law, that such act was a corrupt endeavor to influence, obstruct, or impede the due administration of justice in this court, and that is all that the Government must prove in order to establish the defendant's guilt under Count I.

If you find that the Government has established

beyond a reasonable doubt all the elements as I have enumerated them for you, then you may find the defendant guilty under Count I. However, if you find that the Government has failed to establish any one or more of those elements which I have enumerated to you, you must find the defendant not guilty as to Count I.

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